

1971

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Recommended Citation

Robert A. Sedler, *The Territorial Imperative: Automobile Accidents and the Significance of a State Line*, 9 Duq. L. Rev. 394 (1971).

Available at: <https://dsc.duq.edu/dlr/vol9/iss3/5>

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The Territorial Imperative: Automobile Accidents and the Significance of a State Line

Robert Allen Sedler*

The decision in *Cipolla v. Shaposka*¹ should be pleasing to the "enlightened territorialists" such as Professor Cavers² and Professor Twerski.³ For an "anti-territorialist" such as the present writer, whose approach to choice of law is based primarily upon interest analysis and considerations of fairness applied in the context of particular cases,⁴ it has a somewhat different effect. It forces him to reconsider whether there is *any* validity to the "territorial imperative,"⁵ to which, in the past, either out of excess timidity or some notion of constitutional compulsion, he has made some obeisance. The results of that reconsideration are contained herein. An approach to conflicts problems based upon interest analysis and considerations of fairness necessarily recognizes the significance of territorialism in two important respects. First it recognizes that the occurrence of an act within a state may give rise to a strong interest on the part of that state in implementing its admonitory and regulatory policies.⁶ Secondly it recognizes that in consensual transactions, where there have been extensive factual connections with a particular state, the parties may have relied on the law of that state so that the application of any other law would defeat their legitimate ex-

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1. 439 Pa. 563, 267 A.2d 854 (1970).

2. D. CAVERS, *THE CHOICE OF LAW PROCESS* (1965).

3. Twerski, *Symposium article*, herein.

4. Sedler, *Babcock v. Jackson in Kentucky: Judicial Method and the Policy-Centered Conflict of Laws*, 56 Ky. L.J. 27 (1967); Sedler, *Characterization, Identification of the Problem Area, and the Policy-Centered Conflict of Laws: An Exercise in Judicial Method*, 2 RUTGERS-CAMDEN L.J. 8 (1970). I have summarized the approach as follows: "It is my position that courts should make decisions on the displacement of the forum's law with reference to the fact-law pattern of particular cases, and that the forum's law should be displaced only when its application would defeat the legitimate expectations of the parties or would be violative of the interests of other states, which, under the circumstances, the forum should recognize." Sedler, *Conflict of Laws: Round Table Symposium*, 49 TEX. L. REV. 211, 224 (1971).

5. From R. Ardery, *THE TERRITORIAL IMPERATIVE* (1966).

6. See the discussion in Sedler, *Characterization*, *supra*, note 4 at 67-8. See generally Ehrenzweig, *The Place of Acting in Intentional Multistate Torts*, see 36 MINN. L. REV. (1951). For illustrative cases applying the law of the state of acting in order to implement admonitory and regulatory policies see *Gaither v. Myers*, 404 F.2d 216 (D.C. Cir., 1968) (keys in car); *Williams v. Rawling Truck Line*, 357 F.2d 581 (1965) (vehicle registration upon transfer); *Gordon v. Parker*, 83 F. Supp. 40 (D. Mass. 1949) (alienation of affections); *Schmidt v. Driscoll Hotel, Inc.*, 249 Minn. 376, 82 N.W.2d 365 (1957) (dram shop act).

pectations.⁷ To recognize the significance of territorialism in these two respects is, of course, fully consistent with, and indeed, is an integral part of the approach that I have been advocating. But there is a third situation in which I have grudgingly given in to territorialism to reach a result that is *not consistent* with interest analysis and party fairness—the situation presented in *Cipolla v. Shaposka*.

In terms of interest analysis *Cipolla* presents a true conflict, a point which was recognized by both the majority and the dissent.⁸ Pennsylvania's policy is to provide full compensation to the victim of an automobile accident notwithstanding that he was a guest passenger. Since the social and economic consequences of an automobile accident today will be felt in the victim's home state, to which he will return,⁹ Pennsylvania's interest is no less because the accident occurred in another state. Delaware's policy is to immunize the host. Whether the basis of that policy is to protect the host against ungrateful guests—which no one really believes¹⁰—or to protect insurance companies against collusive suits,¹¹ or simply to deny recovery for this kind of claim thereby increasing the profits of insurance companies and possibly reducing insurance rates,¹² Delaware, as the state of the defendant's residence and the state where the vehicle is insured,¹³ would have an interest in apply-

7. This would appear to be the basis for the "localizing" approach of the state of the most significant relationship rule of the RESTATEMENT (SECOND) § 188. Reliance on the law of a state because of factual connections with that state is illustrated by *Bernkrant v. Fowler*, 55 Cal. 2d 588, 360 P.2d 906 (1961). See also *People v. One 1953 Ford Victoria*, 48 Cal. 2d 595, 311 P.2d 480 (1957), where considerations of fairness to a party because of reliance on the law of another state precluded the forum from applying its own law despite an apparent interest in so doing.

8. 267 A.2d at 857.

9. Unlike the situation that perhaps existed at an earlier period with respect to injured workmen who were temporarily present in the forum, as reflected in *Pacific Employers Ins. Co. v. Industrial Accident Commission*, 306 U.S. 493 (1939), and *Alaska Packers Association v. Industrial Accident Commission*, 294 U.S. 532 (1935).

10. However, as the dissent pointed out in *Cipolla*, this is the purpose the Delaware courts have attributed to their guest statute. 267 A.2d at 858. In any event, in terms of interest analysis, this would be a *legitimate* legislative purpose. As to the ascertainment of legitimate state interest see the discussion in B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 143-4 (1963).

11. See the discussion in *Tooker v. Lopez*, 24 N.Y.2d 569, 249 N.E.2d 394, 397 (1969).

12. Whether or not the existence of a guest statute will actually reduce insurance rates is highly problematical. Professor Morris has demonstrated rather persuasively that the existence of a guest statute as such does not have actuarial significance. Rates will be affected only by the *incidence* of guest-host claims, and if there is a pattern of travel from a guest statute state into a non-guest statute state, e.g., from Delaware to Pennsylvania, loss experience will reflect this fact. See Morris, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight*, 70 YALE L.J. 554, 574-7 (1961).

13. Insurance rates are based on loss experience in a territory of insureds. It does not matter where the accident takes place. See the discussion in Morris, *supra*, note 12 at 567-9.

ing its law here.¹⁴ In the case of a true conflict, the Currie type of interest analysis dictates that each state apply its own law.¹⁵

There can be no doubt that Pennsylvania would have applied its own law had the accident occurred within its borders, and on this point the territorialists—enlightened¹⁶ and not so enlightened¹⁷—would agree with the proponents of interest analysis.¹⁸ But the accident occurred in Delaware, and at least for the present writer, it is at this point that the grudging concession to territorialism has come into play. In referring to this kind of case I have stated:

Of course, [this] case could only arise if defendant were personally served in the non-immunity state. Let us assume that he is. Since the injury occurred in the immunity state and defendant is a resident of that state, despite the interest of the non-immunity state in applying its own law, there is a question of whether it could constitutionally do so. This much of the territorial principle seemingly remains, that a state may not apply its law solely on the ground that the plaintiff is a resident of that state. If defendant did nothing in forum, the causing of an injury to the forum's resident in another state would not be a sufficient constitutional contact to justify the forum's applying its own law.¹⁹

Until *Cipolla*—which incidentally did not go off on constitutional grounds—I had no cases to cite directly in support of this proposition. When pressed (as I have been by my students who, by the time we come to this in class, have been thoroughly exposed to the virtues of interest analysis) I have had to fall back on an analogy to *Home Insurance Co. v. Dick*,²⁰ which is not very satisfactory, since that case involved an insurance contract on property owned by a Texas corporation (Texas

14. In this regard it is irrelevant that the accident occurred in Delaware, as the majority in *Cipolla* recognized. 267 A.2d at 856, n.2.

15. See the discussion in B. CURRIE, *supra*, note 10 at 181-2.

16. See the discussion in D. CAVERS, *supra*, note 2 at 139-145.

17. RESTATEMENT OF THE CONFLICT OF LAWS §§ 377, 378 (1934). RESTATEMENT (SECOND) §§ 145, 146. I view the Restatement (Second) as essentially continuing the rules approach of the original Restatement, and merely changing the rules. See the discussion in Sedler, *Babcock in Kentucky*, *supra*, note 4 at 41, 61-62.

18. Professor Ehrenzweig, whom I refer to as a policy-centered theorist, strongly rejects analysis, and in this situation would say that Delaware law should apply. His "true rule," based on considerations of foreseeability and insurability, looks to the state where the vehicle is insured to determine liability in guest statute cases. A. EHRENZWEIG, CONFLICT OF LAWS 577-581 (1962). Pennsylvania law as the "better law" and the law which would advance the forum's governmental interests would apply under Professor Leflar's choice-influencing considerations. See generally Leflar, *Choice Influencing Considerations in Conflicts Law*, 41 N.Y.U.L. REV. 267 (1966); Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584 (1966).

19. Sedler, *Characterization*, *supra*, note 4 at 68. See also Sedler, *Babcock v. Jackson*, *supra*, note 4 at 127-8.

20. 281 U.S. 397 (1930).

was the forum) but situate in Mexico where the corporation was doing business. I have also fallen back on distinctions between the forum's constitutionally applying its own law to protect its resident defendant from liability on an out-of-state transaction, which, while deplored,²¹ does not seem to have raised constitutional questions,²² and applying its law to allow a forum plaintiff to recover from a non-resident defendant on an out-of-state transaction, drawing analogies to the law of judicial jurisdiction.²³ Reluctant as I have been to argue in this vein and to make this obeisance to territorialism, I stayed with my position through two major law review articles and a score of conflicts classes.

Until *Cipolla* came along, I was able to avoid fully coming to grips with this "vestige of territorialism" that was inconsistent with my basic approach toward choice of law. I have come across only two other cases presenting the situation where a "recovery" state plaintiff was suing a "non-recovery" state defendant²⁴ in the plaintiff's home state for an accident occurring in the defendant's home state.²⁵ In both of these cases I was able to find sufficient factual contacts with the plaintiff's home state to constitutionally justify the application of that state's law.²⁶ This was not really possible in *Cipolla*, at least with the kind of

21. D. CAVERS, *supra* note 2 at 181-194.

22. See, e.g., *Lilliental v. Kaufman*, 239 Ore. 1, 395 P.2d 543 (1964), where Oregon, on "public policy" grounds, applied Oregon law to enable an Oregon "spendthrift" to avoid liability on a California-centered contract. Professor Currie's classic illustration of interest analysis, that of married women's contracts, is another example of such protection on the part of the defendant's home state. B. CURRIE, *supra*, note 6 at 118-119.

23. While jurisdiction can always be exercised on the basis of a state's being the defendant's residence, it is "inconceivable" that a court would exercise jurisdiction on the sole ground that its resident was involved as plaintiff. Such jurisdiction is authorized in contract cases by Art. 14 of the French Civil Code, and other courts will not recognize a judgment entered on this basis. See the discussion in Nadelman, "Jurisdictionally Improper Fora," in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW 329 (1961).

24. I use the terms "recovery" and "non-recovery" to encompass (1) the existence or non-existence of substantive tort liability, (2) an anti-tort immunity, such as guest statute or charitable immunity, and (3) limitations on damages recoverable for wrongful death. As to "anti-tort" immunity, see Sedler, *Characterization*, *supra*, note 4 at 49-56.

25. In *Satchwill v. Vollrath Co.*, 293 F. Supp. 533 (E.D. Wis.), the decedent, a resident of Ohio, was killed in Wisconsin while inspecting machinery at the factory of a Wisconsin corporation. Wisconsin limited the damages recoverable for wrongful death; Ohio did not. In terms of interest analysis, the case, of course, presented a true conflict, and the federal court, sitting as a Wisconsin court, applied Wisconsin law to limit recovery.

26. In *Schneider v. Nichols*, 280 Minn. 139, 158 N.W.2d 254 (1968), the plaintiff was a resident of Minnesota, a non-guest statute state, the driver was a resident of North Dakota, a guest statute state, and the accident occurred in North Dakota. The driver was a former resident of Minnesota, his vehicle had a Minnesota license plate, and he did much of his work there. The particular accident resulted from a trip that began in Minnesota and continued through both states. The Court applied Minnesota law, emphasizing the fact that the vehicle was regularly used in Minnesota.

In *Miller v. Miller*, 22 N.Y.2d 12, 237 N.E.2d 877 (1968), the decedent was a resident of New York, and the defendant, his brother, was a resident of Maine at the time of the accident, but had subsequently moved to New York. Maine had a limitation on the amount

factual contacts I had used in the past. I probably should have welcomed the opportunity to confront my obeisance to territorialism that an analysis of the case necessarily required. I have always contended that conflicts problems should be approached only with reference to the fact-law pattern of particular cases and that academic commentators should concentrate on the kind of cases that actually do arise rather than on the hypothetical ones which may never arise.²⁷ In *Cipolla*, the hypothetical case became real. Despite some initial resistance—motivated by a not unnatural desire to avoid admitting that one was incorrect—I have been able to finally abandon this vestige of territorialism and to take my stand as a pure anti-territorialist. In so doing, I find that I am willing to go further than even I had thought possible in disregarding the territorial imperative and the significance of a state line.

I want to begin my analysis of the problem presented in *Cipolla* by looking at what I call the *existential-legal* component of the case. By that I mean I want to look at the realities of the case—in behavioral and practical terms—and to see how the law responds to those realities. First let me look at the reality of the state line that separates Southeast

recoverable for wrongful death at the time of the accident (it was subsequently repealed), while New York did not. The decedent and the defendant were engaged in business together, and the decedent made frequent trips to Maine. I originally argued that the continuing business relationship between the parties, which was the reason for the decedent's presence in Maine at the time of the fatal accident, justified the application of New York law and satisfied the "sufficient constitutional contact" test. Also, the fact that the defendant was a resident of New York at the time of the suit would be relevant for constitutional purposes, notwithstanding that interests are usually determined at the time of the accident in question. See *Reich v. Purcell*, 67 Cal. 2d 551, 432 P.2d 727 (1967).

The New York court concentrated on "foreseeability and insurability." It pointed out that under Maine law the defendant would have been fully liable for compensatory damages if the decedent had lived, and that Maine automobile insurance policies did not distinguish between liability for personal injuries and liability for wrongful death, so that there was no "reliance" on the Maine limitation. 237 N.E.2d at 881. Also under Maine law the insurance policy could not be limited to accidents occurring in Maine. 237 N.E.2d at 882. Thus, unlimited liability was "foreseeable and insurable," and there was no unfairness in holding the insurer to the New York standard (it goes without saying that the nominal defendant wanted his brother's beneficiaries to have full recovery against his insurance company). Having found no unfairness to the parties by the application of New York law, the Court next considered whether the application of that law would "unduly interfere with a legitimate interest of a sister state" and concluded that it would not. Here the fact that the defendant had moved to New York after the accident was significant, since a judgment would not now be entered against a Maine resident. And in any event, at the time of suit, Maine had removed the limitation. 237 N.E.2d at 882. The Court also concluded that New York rather than Maine had the "most significant relationship" with the issue, so that there was no constitutional infirmity in the application of New York law. 237 N.E.2d at 883. The *Miller* case is an excellent example of the "interest and fairness" approach, which totally disregards the "territorial imperative." I now recognize that it did not need to be explained with reference to "sufficient constitutional contacts," and its rationale is equally applicable to *Cipolla*, as I will point out.

27. See the discussion in Sedler, *Babcock v. Jackson*, *supra*, note 4 at 102-105; Sedler, *Roundtable Symposium*, *supra*, note 4 at 227.

Pennsylvania and Northern Delaware. That line is, of course, legally real. It has been said that the legal order is "decentralized among a plurality of sovereign or autonomous authorities, each asserting jurisdiction within a defined territory."²⁸ When disputes arise involving the territory or people of two or more legal systems, "The legal order tries to integrate the diversity of laws of which it is composed."²⁹ As far as different laws are concerned, the line is also factually real in the sense that people recognize that a different sovereignty exists on the other side of the state line, and as Professors Cavers and Twerski contend,³⁰ it is not unreasonable to expect them to be subject to the law of the state where they are at the time they are acting.

But people do not live their day-to-day lives in the expectation of legal consequences, and the decision to cross a state line will not usually depend upon legal considerations. Moreover, in functional, socio-economic and mobility terms, people do not live in or identify with a state so much as they do with a particular area, which, depending on geography, may be wholly within a particular state, or may cut across state lines. Having lived the first twenty-four years of my life in Pittsburgh, I have some understanding of the different functional areas that exist in Pennsylvania. As a Pittsburgher, I thought of myself as living in Western Pennsylvania, or in a tri-state area which included Northern West Virginia and Eastern Ohio. Philadelphia was as remote from Pittsburgh in this sense as Washington or New York. Likewise, as the facts in *Cipolla* make clear, Delaware County, Pennsylvania, and Wilmington, Delaware, are part of the same functional socio-economic and, particularly for our purposes, mobility area. The state line between Delaware County and Wilmington that has been made significant for legal purposes then is not real insofar as the day-to-day life of the people living in the area is concerned. Query, therefore, whether legal consequences should depend on the existence of a state line that is not functionally real.

Secondly, in legal contemplation this was a suit between Michael Cipolla and John Shaposka, Jr. Michael considered John a tortfeasor and John considered Michael an unwanted guest, as evidenced by the fact that he was asserting the defense of guest-host immunity. But as everyone knows, the suit in reality was between Michael and John's

28. Yntema, *The Historic Bases of Private International Law*, 2 AM. J. COMP. L. 297 (1953).

29. *Ibid.*

30. CAVERS, *supra*, note 2 at 147; Twerski, Symposium article at 12-13.

insurer, the Allstate Insurance Company of Valley Forge, Pennsylvania. Thus, the real defendant was a Pennsylvania corporation, or at least a company with its principal place of business there. Suppose that Pennsylvania had a direct action statute, so that Michael could have proceeded directly against the insurer. If this were so, would not this be similar to a controversy between two Pennsylvanians arising out of an accident in another state which, according to the Pennsylvania Supreme Court, presents a false conflict and should be controlled by Pennsylvania law?³¹ Let us also analyze the policies behind the guest statute from this perspective. If the purpose of the guest statute is to protect the host from ungrateful guests, should not the host be able to decide whether he wants such protection, and if he decides that he does not, why should the insurance company be able to avoid its contractual obligation to cover *his* liability? Whereas, if the purpose is to protect the insurance company from collusive suits, should not Pennsylvania decide whether this Pennsylvania-based company should receive the protection? And even if the purpose of the Delaware guest statute is to lower insurance rates by excluding certain kinds of claim from recovery (as well as protecting insurers of Delaware-registered automobiles from collusive suits), its interest in implementing this policy is no greater than Pennsylvania's interest in allowing recovery on the part of its accident victim. May not this case have been decided as it was simply because Pennsylvania did not have a direct action statute and continued to maintain the fiction that the suit was between the passenger and the host?³²

On the other hand, it can be argued that the only reason that the suit could be brought in Pennsylvania was because the defendant had been personally served with process there. If we would abandon the concept of "transient jurisdiction," the unsoundness of which has been well-demonstrated,³³ this case would not be before the Pennsylvania court simply because the plaintiff "happened to catch the defendant there."

31. See *Griffith v. United Air Lines*, 416 Pa. 1, 203 A.2d 796 (1964); *Kuchinic v. McCrory*, 422 Pa. 620, 222 A.2d 897 (1966); *McSwain v. McSwain*, 420 Pa. 86, 215 A.2d 677 (1966).

32. Professor Twerski states, "I think we rather underestimate the embarrassment of the lawyer in the *Cipolla* case who had to explain to the defendant that he was being dragged through a trial because no one was quite sure which law governed his activities." *Symposium article*, 12. I would suggest that the insurance company lawyer was not at all concerned about the nominal defendant, and that if he was embarrassed at all, it was in telling the nominal defendant that his friend could not recover under the insurance policy. The insurance company would expect to be "dragged through a trial" whenever it refused to pay, which is why it hires expensive lawyers to represent it.

33. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 *YALE L.J.* 289 (1956).

The answer to this query is that the plaintiff did not “happen to catch the defendant there.” The defendant was served when he was playing golf with the plaintiff in Pennsylvania,³⁴ and it takes no feat of imagination to assume that this was pre-arranged. If Pennsylvania had a direct action statute, the plaintiff could have gone against Allstate, the Pennsylvania-based insurer of the Delaware-registered automobile. The pre-arranged service on the nominal defendant was simply a realistic response to the unrealistic and fictitious legal concept which pretends that an automobile accident suit is between the victim and the driver—a concept that is totally absurd when the parties are personal friends—rather than between the victim and the driver’s insurer. Since the victim and the insurer in *Cipolla* were Pennsylvanians for jurisdictional purposes, there was nothing “transient” about Pennsylvania’s exercise of jurisdiction here.

Finally, there is the undisputable fact that if the accident had occurred on the Pennsylvania side of the line—the parties were traveling to Pennsylvania at the time—³⁵ the Pennsylvania court would have applied its own law³⁶ and jurisdiction could have been sustained under the non-resident motorist act.³⁷ When I first thought about this point, I reasoned that while it may not seem rational that the result in a case should depend on whether an accident occurred on this side or that side of a state line, nonetheless, state lines do exist and that such a result should be considered “the price of federalism.” But, on further reflection I asked, “Why should it be?” The result is justified as the “price of federalism” only if we attach independent significance to the state line. If the only reason to attach independent significance to the state line is that this is the “price of federalism,” we have fallen prey—as we so frequently do—to circular reasoning.³⁸ It is not the “price of federalism” unless we are willing to pay that price, and we do not have to pay it unless we are willing to say that a federal system requires that we attach independent significance to the existence of a state line.

34. Deposition of M.F. Cipolla, Record, p. 23.

35. Opinion of Court of Common Pleas of Delaware County, Record, p. 41.

36. As both Professor Cavers and Professor Twerski would advocate. Cavers, *supra*, note 2 at 139-145; Twerski, *Symposium article*, 7-8. See the discussion of this case in Sedler, *Babcock v. Jackson*, *supra*, note 4 at 117-20.

37. PA. STAT. ANN. TIT. 75 § 2001.

38. The justification for allowing a suit that is not barred by the forum’s statute of limitations but is barred by the state whose substantive law will govern is that the statute of limitations “destroys only the remedy, not the right.” But the reason given for the conclusion that the statute of limitations destroys only the remedy is that suit can be maintained in another forum with a longer limitation period. See the discussion in Lorenzen, *The Statute of Limitations and the Conflict of Laws*, 28 YALE L.J. 492, 496 (1919).

Realistically, to say that a choice of law decision should not depend on the side of a state line where an accident occurs will in no way affect the vitality of our federal system.

Looking at the case existentially then, I come to the conclusion that Pennsylvania should apply its own law and allow recovery. The dispute essentially involves a Pennsylvania plaintiff and a Pennsylvania-based insurance company. If there is a conflict between Pennsylvania's policy of allowing compensation to an accident victim and Delaware's policy of protecting insurance companies and perhaps reducing Delaware insurance rates, there is no valid reason why Pennsylvania should defer to Delaware's policy and no rational way by which a court can decide which policy should be preferred.³⁹ There is nothing unfair about the application of Pennsylvania law here. The nominal defendant's insurance policy covers guest-host accidents; the insurance company did not rely on Delaware law in setting its rates; and the fact that Delaware has a guest statute would only affect the loss experience that was the basis of those rates peripherally, if at all.⁴⁰ The lack of unfairness is demonstrated most cogently by the fact that if the accident had occurred on the Pennsylvania side of the line, it would have been assumed that the application of Pennsylvania law was perfectly fair. In terms of reliance and the expectations of the insurance company and the nominal defendant, it is difficult to see how any unfairness results from the application of Pennsylvania law even if the accident occurred on the Delaware side of the line.⁴¹ Thus, based on considerations of policy and fairness, I would say that Pennsylvania should have applied its own law in *Cipolla* and allowed recovery.⁴²

The only possible obstacle to the application of Pennsylvania law would be my concern with "sufficient constitutional contacts." Having

39. See the discussion in B. Currie, *supra*, note 10 at 181-2.

40. See the discussion, *supra*, note 12.

41. Professor Twerski concedes the absence of unfairness in this regard. Symposium article, 6-8. The unsoundness of the notion that the application of Pennsylvania law would be unfair, because "inhabitants of a state should not be put in jeopardy of liability exceeding that created by their state's laws just because a visitor from a state offering higher protection decides to visit there," relied upon by the Court in *Cipolla*, 267 A.2d at 857, was clearly demonstrated by the Court in *Miller v. Miller*, *supra*, note 26, at 237 N.E.2d at 881-2. The *Cipolla* Court merely stated a conclusion while the *Miller* Court precisely analyzed whether any unfairness would result.

42. I disagree with the approach of the dissenting justice in *Cipolla* that Pennsylvania law should have been applied because it was the "better law." When courts have talked in terms of the "better law," as in *Conklin v. Horner*, 38 Wis. 2d 468, 157 N.W.2d 579 (1968), not coincidentally, the "better law" has been its own. In *Satchwill v. Vollrath Co.*, *supra*, note 25, the federal court sitting as a Wisconsin court, assumed that Wisconsin would apply its limitation rule to advance its governmental interest notwithstanding that "no limitation" would be considered the "better law." See also the discussion in *Fuerste v.*

reconsidered that concern, I find that it has no justification and this is apart from whether it could be argued that the fact that the insurance company was Pennsylvania-based was sufficient. What I want to do now is to retract my statement to the effect that: "A state may not apply its law solely on the ground that the plaintiff is a resident of that state. If defendant did nothing in forum, the causing of an injury to the forum's resident in another state would not be a sufficient constitutional contact to justify the forum's applying its own law."⁴³ Totally eliminating the notion of sufficient constitutional contacts as such, I would say that the forum may apply its own law on the ground that the plaintiff is a resident of that state where: (1) *the fact of residency gives it an interest in applying its law on the issue as to which a conflict exists, and* (2) *the application of its law does not produce fundamental unfairness or defeat the legitimate expectations of the other party.*

An analysis of Supreme Court decisions involving constitutional limitations on choice of law indicates that interest and fairness determine constitutionality rather than factual contacts.⁴⁴ In *Home Insurance Co. v. Dick*,⁴⁵ it could not be said that Texas had any legitimate interest in applying its law to invalidate a built-in limitation period contained in a contract between a Mexican insurer and a Texas corporation covering property situate in Mexico. Moreover, that case involved a consensual transaction centered in Mexico, so that the insurer should have been entitled to rely on the Mexican law upholding the validity of those agreements.⁴⁶ In *Cipolla* Pennsylvania had a real interest in implementing its tort policy of allowing recovery to an injured Pennsylvanian irrespective of where the accident occurred since the social and economic consequences of the injury would be felt in Pennsylvania. And as we have previously demonstrated, neither the

Bemis, 156 N.W.2d 831, 834-5 (Iowa 1968). If the forum's "worse law" is judicially-created, the court can abandon it. If it is legislatively created, and the legislation is constitutional, the court may not properly refuse to apply it when the policy to be implemented by the law is equally applicable to an interstate situation. In this regard I am in full agreement with Professor Cavers. See Cavers, *Conflict of Laws: Roundtable Symposium*, 49 Tex. L. Rev. 211, 212-215 (1971).

43. *Supra*, note 19.

44. This matter is thoroughly discussed in B. Currie, *supra*, note 10, ch. 5. See also *Clay v. Sun Insurance Co., Ltd.*, 377 U.S. 179 (1964), the latest "Supreme Court word" on the subject. Although the Court talked about "ample contacts with the present transaction and the parties," the rationale of the decision is fully consistent with the interest and fairness test.

45. 281 U.S. 397 (1930).

46. In *Clay* the Court referred to *Dick* as a case where activities in the forum were "wholly lacking." 377 U.S. at 182. As Professor Currie observes, "Texas had no legitimate interest in the application of its law and policy." B. Currie, *supra*, note 10 at 232.

nominal defendant nor the insurance company could be said to have relied on the Delaware law in the expectation of avoiding liability.⁴⁷ Thus, under the interest and fairness test, the application of Pennsylvania law here is fully constitutional. The causing of an injury to the forum's resident in another state, I now realize, is a sufficient constitutional basis for the forum's applying its own law because of its obvious interest in so doing and because, as has been demonstrated, this produces no unfairness to the other party or his insurer.

Having been liberated from my past obeisance to the territorial imperative, I am now prepared to go further and argue that the result in an interstate automobile accident case should not depend upon which side of the state line it occurred. This would mean, realistically, that when the plaintiff resides in a recovery state and suit is brought there, that state should apply its own law irrespective of where the accident occurred and where the defendant resides. I have obviously taken a rather strong anti-territorialist position. A critic of my position would probably confront me with the following case to prove its unsoundness. In the middle of Delaware a Pennsylvania student going to school in Southern Delaware hitches a ride with a Delaware driver going in that direction, and shortly afterwards an accident occurs. Suit is brought in Pennsylvania, where the driver is personally served. It is defended by his Delaware insurance company, which, we will assume, does no business in Pennsylvania. How would I decide *that* case, my critic would ask?

I could respond to my critic in the classic manner of a law professor and instead of answering the question, come back with a question of my own: To the best of your knowledge, has such a case come before an appellate court for decision? I know of none. All of the conflicts guest statute cases I have seen involve parties who have had a prior relationship before the trip began. I think that the "hitchhiker" case is largely a matter of myth.⁴⁸ Admittedly, cases reaching an appellate court represent only a small number of the cases actually litigated (although I think the proportion is substantially higher for conflicts cases) and only an infinitesimal number of the cases that actually arise. But whether or not the appellate court cases accurately mirror the

47. Again, this point is made crystal clear by the discussion in *Miller v. Miller*, *supra*, note 41. Analogously, it should be noted that in *Cipolla* the driver would have been fully liable to a non-guest and that the coverage had to extend to out-of-state accidents.

48. Although I have not checked this out, I would imagine that the overwhelming majority of non-conflicts guest-host cases involve parties who have had a prior relationship before the trip began.

cases that arise, they are the cases in which courts make conflicts law and the cases about which academic commentators speculate. Since the reported cases do not appear to involve this situation, I would query whether it is a valid one to demonstrate the soundness or unsoundness of my position.

But I will not take the academic "cop-out"; I will try to deal with this completely hypothetical case. Looking at what I call the existential-legal component, this is a very different case from *Cipolla*. Here the state line is factually real. The functional socio-economic and mobility area where the accident occurred was solely in Delaware. Secondly, the plaintiff and nominal defendant may really be adverse.⁴⁹ The driver may be regretful that he picked up the plaintiff, particularly if he thinks that his involvement in this accident on which a suit has been filed may increase his insurance rates.⁵⁰ On the other hand, he may feel guilty about the accident and want to see the plaintiff compensated. We are not likely to know the answer to this question in the context of adversary litigation. If the real purpose of a guest statute were to protect the host from ungrateful guests rather than to protect insurance companies,⁵¹ it should be up to the host-insured whether or not to assert the defense. And he should be able to refuse to do so without jeopardizing his insurance claim of liability protection. Of course, this is not the way it is, and the host will have no say in the matter. The insurance company's lawyer will assert the defense. In terms of interest analysis, this case still presents a true conflict. Pennsylvania's interest in providing compensation for its resident victim is the same as in *Cipolla*. Delaware's interest, however, may be stronger, since it is interested in protecting the profits of a Delaware insurance company as well as in preventing the somewhat hypothetical increase in insurance rates. But the major existential-legal difference is that the accident occurred exclusively in a Delaware functional, socio-economic and mobility area rather than in a Pennsylvania-Delaware one, as in *Cipolla*.

The first question I would ask is whether Pennsylvania has jurisdiction to hear the case at all. Since the insurance company does not do business in Pennsylvania, jurisdiction can only be based on the personal service obtained against the driver in Pennsylvania. Jurisdiction

49. If they are, service on the non-resident defendant in Pennsylvania is not very likely. At least it will not be pre-arranged.

50. Whether rates will be increased probably will not depend on the fact that a suit has been filed. Apparently insurance company rating practices depend on accident involvement rather than liability.

51. This is a *legitimate* interest notwithstanding that it may be hypothetical.

based on personal service, the "power myth of jurisdiction," is completely indefensible, as Professor Ehrenzweig has so ably demonstrated.⁵² If the Pennsylvania court would be prepared to abandon the power myth in favor of an exercise of jurisdiction based on minimum contracts,⁵³ it would probably have to dismiss the case for want of jurisdiction. The residence of the plaintiff, without more, would not constitute a minimum contact justifying the exercise of jurisdiction.⁵⁴ Here the accident occurred in a Delaware functional, socio-economic and mobility area, the driver—whose interests may be adverse to the plaintiff—was from Delaware, and the insurance company did no business in Pennsylvania. Because the accident occurred in an area that was solely within Delaware and because a Pennsylvania insurer is not involved, the Delaware state line should be significant here. Even if Pennsylvania is not prepared to abandon the power myth of jurisdiction, it should in this case recognize the significance of a state line and not apply its own law. In any event, if it were not for the power myth of jurisdiction, this case could not arise, even hypothetically.

However, it is highly unlikely that the insurance company would not be doing business in Pennsylvania since most automobile liability insurance companies are national concerns. It is therefore probable, even assuming the same facts regarding the accident, that the driver's insurance company was doing business in Pennsylvania. This being so, the plaintiff should be able to sue in Pennsylvania on the ground that the defendant's insurance company is doing business there. I would allow such a suit, even in the absence of a direct action statute, since the courts can recognize—even if the legislature does not—that personal injury litigation is between the plaintiff and the driver's insurance company. In this case, not only is Pennsylvania a proper forum, but it is equally proper for Pennsylvania to apply its own law. There is no unfairness in Pennsylvania's imposing liability on an insurance company doing business in Pennsylvania when one of its insureds injures a Pennsylvania resident, irrespective of where the accident occurs or where the particular vehicle is insured. And, again, Pennsylvania's interest in providing compensation for its injured resident at the expense of the insurance company is no less than Delaware's in-

52. *Supra*, note 33.

53. See the discussion, *supra*, note 33 at 312-4.

54. A long-arm statute providing for the exercise of jurisdiction solely on the basis of the plaintiff's residence, it may be assumed, would be held unconstitutional. See note 23, *supra*.

terest in protecting insurance companies or in trying to keep down insurance rates. Since the driver's insurance company does business in Pennsylvania, Pennsylvania can properly hear the case and apply its law allowing recovery.

To make my next point, however, I want to disregard reality once again and assume that the driver's insurance company does not do business in Pennsylvania. This time our plaintiff is a housewife who lives in Delaware County, Pennsylvania. She is shopping in downtown Wilmington and during a downpour is given a lift by a passing motorist to her destination three blocks away. An accident occurs, and she is severely injured. We will assume that Pennsylvania has abolished jurisdiction based on personal service, or, that in any event, that the driver cannot be personally served in Pennsylvania. Suppose that she brings suit against the driver and his insurance company in Pennsylvania. Can Pennsylvania take jurisdiction⁵⁵ and apply its own law to allow recovery? I would say *yes* on the ground that in this situation: (1) Pennsylvania is not an inconvenient forum, and (2) the application of Pennsylvania law is not fundamentally unfair and would not defeat the legitimate expectations of the parties. I have thus tied jurisdiction and choice of law together, as I did in the two previous examples,⁵⁶ in a manner similar to Professor Ehrenzweig's "proper law in a proper forum" approach,⁵⁷ although he certainly would not agree with my view as to proper law,⁵⁸ but might as to proper forum.⁵⁹

My justification for this anti-territorialist heresy both as to jurisdiction and choice of law goes to the matter of *area*.⁶⁰ As *Cipolla* indicates, Southeastern Pennsylvania and Northern Delaware, particularly Delaware County, Pennsylvania, and Wilmington, Delaware, constitute a

55. We will assume adequate notice on the basis of substituted service. In this situation notice should present no practical problems.

56. Where the accident occurred in a Delaware functional socio-economic and mobility area and the insurance company did not do business in Pennsylvania, I said that Pennsylvania should not take jurisdiction and that if it did, it should not apply its law. Likewise, where the insurance company was doing business in Pennsylvania, I said that Pennsylvania should take jurisdiction and apply its law.

57. Ehrenzweig, *A Proper Law in a Proper Forum: A Restatement of the "Lex Fori Approach,"* 18 OKLA. L. REV. 340 (1965).

58. EHRENZWEIG, *CONFLICT OF LAWS* 577-581 (1962). Professor Ehrenzweig contends that the "true rule" looks to the state where the vehicle is insured.

59. Professor Ehrenzweig upholds the exercise of jurisdiction over non-residents "where fair play and the opportunity to be heard will be secured by proper notice and 'minimum contacts,' such as the place of contracting, performance or residence." *Supra*, note 58 at 120. Although he does not discuss "area," it would seem that this concept would satisfy his "fair play" criteria.

60. Area is only significant in the unlikely event that the insurer does not do business in Pennsylvania. Both the first and the present examples proceed on this somewhat unrealistic assumption.

functional, socio-economic and mobility area. People working in Wilmington may live in Delaware County. People living in Delaware County may shop in Wilmington. The interdependence and inter-relationship between these parts of the two states make the state line functionally irrelevant. If this is so, then, in my opinion, at least for jurisdiction and choice of law purposes, that state line should be legally irrelevant as well. It is certainly more "convenient" for a resident of Wilmington—and his Delaware insurance company—to defend an action in the courts of Delaware County, Pennsylvania, than it is for a resident of Pittsburgh. Yet the "state line syndrome" would say that the resident of Pittsburgh is subject to the jurisdiction⁶¹ of the Delaware County courts while the resident of Wilmington is not. Likewise, the resident of Wilmington is far more likely to be driving through Delaware County on a day-to-day basis than is the resident of Pittsburgh. As to him, Pennsylvania law is equally "foreseeable and insurable,"⁶² and to hold him and his insurer to the Pennsylvania standard when he injures a Pennsylvanian on the Delaware side of the area is in no sense fundamentally unfair and will defeat no legitimate expectations of him or his insurer.⁶³

I am thus prepared to carry my analysis of *Cipolla* to this "logical conclusion" and to disregard completely the significance of a state line in most automobile accident cases.⁶⁴ When one of the states in a functional, socio-economic and mobility area would allow the plaintiff to recover, I would say that he should be able to sue there and obtain the benefit of its law.⁶⁵ When the driver's insurance company does business in the plaintiff's home state and that state allows the plaintiff to recover, again he should be able to sue there and obtain the benefit of its law. This is *not* a plaintiff-recovers approach. It only appears that way from my analysis of *Cipolla* and the spin-off examples, because there the plaintiff was from a recovery state and the defendant was from a non-

61. While he might be protected from such a suit by venue requirements, this will not always be true.

62. As to the "foreseeable and insurable" principle, see generally A. Ehrenzweig, *supra*, 58 at 568-97.

63. As evidenced by the fact that unquestionably there would be liability if the accident had occurred on the Pennsylvania side of the line.

64. It is only in the unlikely event that the insurer was not doing business in the plaintiff's home state *and* that the accident occurred in a functional socio-economic and mobility area wholly within a single state that the state line would be significant.

65. Where the defendant is from a recovery state, the plaintiff should recover, since the only state interested in protecting the defendant and his insurer does not do so. Here it would not matter whether suit was brought in the plaintiff's state or the defendant's state. See the discussion in Sedler, *Characterization*, *supra*, note 4 at 60-61.

recovery state. I would also contend, however, that when two parties from a non-recovery state are involved in an accident in a recovery state, recovery should be denied, since the only state having a real interest in protecting the plaintiff chooses to protect the insurance company instead.⁶⁶

My approach to recovery in automobile accident cases generally looks to the residence of one or both of the parties.⁶⁷ The place where tortious conduct occurs is significant in my view only when an admonitory policy of that state is involved,⁶⁸ which will usually not be so in the automobile accident case, although it sometimes may.⁶⁹ I may be accused of advocating a personal law of torts in automobile accident cases,⁷⁰ and the charge does not bother me. In this day of the interstate highway⁷¹ and the jet airplane,⁷² of bedroom suburbs and regional

66. See the discussion in Sedler, *Characterization*, *supra*, note 4 at 64-5; Sedler, *Babcock v. Jackson*, *supra*, note 4 at 123-6; Sedler, *Symposium*, *supra*, note 4 at 226-7. Where suit is brought in the parties' home state, that state, assuming it has abandoned the traditional approach, will apply its own law and deny recovery. See, e.g., *Wartell v. Formusa*, 34 Ill. 2d 57, 213 N.E.2d 544 (1966); *Fuerste v. Bemis*, 156 N.W.2d 831 (Iowa 1968); *McSwain v. McSwain*, 420 Pa. 86, 215 A.2d 677 (1966); *DeFoor v. Lematta*, 249 Ore. 116, 437 P.2d 107 (1968). The crucial question is what the courts of the recovery state will do, and here the courts are divided. Recovery was allowed in *Arnett v. Thompson*, 433 S.W.2d 109 (Ky. 1968), and in *Conklin v. Horner*, 38 Wis. 2d 468, 157 N.W.2d 579 (1968), and denied in *Thompson v. Thompson*, 107 N.H. 30, 216 A.2d 781 (1966).

67. Where the defendant's home state allows recovery, recovery should be allowed irrespective of whether or not it is allowed by the law of the plaintiff's home state. If the plaintiff and defendant are from the same state, I would apply that state's law either way. A true conflict, in my view, arises only where the plaintiff is from a recovery state and the defendant is from a non-recovery state. There I would say that each state should apply its own law.

68. See the discussion, *supra*, note 6 and accompanying text. Thus, I argue that where a party from a non-recovery state commits an intentional tort against a victim from a non-recovery state in a recovery state, the recovery state should apply its own law. See the discussion in Sedler, *Characterization*, *supra*, note 4 at 67-8. By the same token where a recovery state defendant commits an intentional tort against a recovery state plaintiff in a non-recovery state, the parties' home state may decide that its law is inapplicable, particularly where the tort is not one that results in personal injury. See *Tattis v. Karthans*, 215 So. 2d 685 (Miss. 1968) (actionable word statute inapplicable where publication took place in North Carolina, which did not impose such liability). But where Mississippi parties are involved in an automobile accident in a non-recovery state, Mississippi will apply its own law. *Mitchell v. Craft*, 211 So. 2d 509 (Miss. 1968).

69. However, the automobile accident cases involving an admonitory policy of the state where tortious conduct has occurred see the accident resulting from that conduct occurring in another state. Moreover, the state where the act occurred was the residence of the defendant. See *Gaither v. Myers*, *Williams v. Rawling Truck Line*, *Schmidt v. Driscoll Hotel Co.*, *supra*, note 6.

70. In *Dym v. Gordon*, 16 N.Y.2d 120, 209 N.E.2d 792, 796 (1965), the Court, in refusing to apply New York law on the issue of guest-host immunity to an accident occurring in Colorado between two New Yorkers, observed that to apply New York law would be to "give an overriding significance to a single factor reminiscent of the days when British citizens travelled to the four corners of the world secure in the belief that their conduct would be governed solely by the law of England."

71. This means that two parties from the same state travelling in separate vehicles may become involved in an accident in another state. See e.g., *Schmidt v. Driscoll Hotel Co.*,

shopping centers, it makes far more sense to me to look to the place where the social and economic consequences of allowing or disallowing recovery will be felt rather than the place where an accident happened to occur.⁷³ The place where an accident occurs may not be "fortuitous" in the sense that if the vehicle or vehicles had not been in that particular place at that particular time there would not have been an accident, but in realistic and practical terms, it is certainly irrelevant.

My fundamental quarrel with territorialism, enlightened or not, is that it necessarily attaches significance to the existence of a state line. As Professor Cavers has stated:

Our states and nations are territorially organized; the legal order that each has created impinges on actions and affairs which, in a very high proportion of all instances, are wholly domestic to the state where they take place. To withdraw like actions and affairs from the reach of domestic law because the persons participating in them are not domestic to the state causes a wrench away from customary attitudes toward law⁷⁴

Professor Twerski in his article⁷⁵ refers to a state's "anti-tort" policy determination, *e.g.*, that a guest cannot recover from a host, as a "policy determination of the highest order," and goes on to assert that, "To say it is a localized judgment and that this high priority moral statement is for local consumption only is to deny the potency of the very decision to negate normal compensatory policies." While I cannot disagree with either statement as such, they seem to beg the fundamental question. The fact that state lines exist does not mean that they should be significant in automobile accident cases. The fact that limiting policy determinations represented by a state's law to residents of a state will make those determinations less potent furnishes no justification for applying them to non-residents when other considerations militate against this.

The state line as a basis for the solution of conflicts problems becomes significant only if we make it. We can solve these problems on

supra, note 6; *Mitchell v. Craft*, *supra*, note 68; *Grant v. McAuliffe*, 41 Cal. 2d 859, 264 P.2d 944 (1953).

72. Even the territorialists would not contend that the place where the airplane crashed should be significant in determining limitations on the amount recoverable for wrongful death, which will usually be the issue in such cases.

73. Where both parties are from a recovery state, the case, of course, presents a false conflict, and Professor Cavers would agree that the law of the parties' home state allowing recovery should be applied. See the discussion in D. Cavers, *supra*, note 2 at 151. *But see* Twerski, *supra*, note 3 at 15-18.

74. D. Cavers, *supra*, note 2 at 135.

75. Twerski, *supra*, note 3 at 16.

the basis of territorialism or we can look at them existentially in light of social, economic and behavioral realities. We can give maximum weight to the place where an automobile accident occurred or we can recognize that in this day and age the social and economic consequences of automobile accidents will be felt in the place where the parties live. We can see state lines as marking off separate "sovereignities" or we can look to functional, socio-economic and mobility areas which often cut across state lines. The question is which approach is more *valid* to enable us to solve the kinds of problems that confront courts in conflicts cases.

In *Cipolla*, if the accident had occurred in Delaware County, Pennsylvania, instead of in Wilmington, Delaware, the plaintiff could have recovered; because it occurred on the Delaware side of the line, he is barred. *But the human dimension of the case is the same in either case.* A young man is injured when riding in the automobile of a friend while they are on their way from the school they both attend to the young man's home. The driver would like to see the victim recover, but his insurance company, for obvious reasons, does not. Because of the difference in the laws of the two states that make up the functional, socio-economic and mobility area in which they live, we say that there is a conflict of laws. The suit is brought in the plaintiff's home state where the insurance company apparently has its principal place of business and where it may be incorporated. The social and economic consequences of the accident upon the victim will be felt in that state. Under its law the plaintiff is entitled to recover and if the accident had occurred on the Pennsylvania side of the line there is no doubt that recovery would be allowed. But since it occurred on the Delaware side, under the territorialist view, recovery should be denied. Thus, the *human result* would depend on whether the accident occurred on the Delaware or Pennsylvania side of the line, a difference of a few miles.⁷⁶ *Quid est demonstrandum.*

76. I cannot resist taking some issue with Professor Twerski's example of the "argument at a friend's house," *supra*, note 3 at 14. He suggests that the couple at whose home the argument takes place will be far more "interested" in the matter than the couple who were not present, but were told about it later. I question whether this will necessarily be so. The fact that the argument took place in the first couple's home is a factor to be considered, and based on that factor alone, they are more likely to be talking about it. But this is only one factor. Their "interest" will depend also on their own marital situation and their identification or lack of identification with the arguing parties. The couple who were not present may in reality be more interested, particularly if they had a similar argument recently and/or have serious inlaw problems. Likewise the fact that an accident occurs within a state may give rise to an interest on the part of that state in applying its own law but then again it may not. One of the functions of interest analysis is to determine when such an interest exists.

For conflicts law to disregard the significance of a state line in automobile accident cases is merely to bring that body of law into line with reality and with the behavior patterns and way of life of the people whom law is designed to serve. It is time to stop worshipping at the altar of the state line.